STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD WALTER BARAN,

Defendant-Appellant.

UNPUBLISHED
October 3, 1997

No. 186838
Recorder's Court
LC No. 95-000385

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his bench convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(e), and one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305a(2). We affirm.

I

Defendant asserts that the trial court's findings of fact were clearly erroneous and that the trial court denied defendant his constitutional right to confrontation. We disagree. The trial court did not err in its conclusion that the complainant's medical records showed abrasions consistent with an assault. Similarly, the trial court's finding that the condition of her neck was consistent with an assault was not clearly erroneous. The complainant testified that defendant grabbed and held her by her throat. Further, her medical records indicated the presence of a linear abrasion consistent with the time of the alleged assault. This evidence supports the trial court's findings. Furthermore, the trial court's misstatement that the medical records indicated "some linear abrasions" when in fact they indicated only "a [single] linear abrasion" was harmless because the relevance of the medical records hinged on the fact of abrasion rather than on the precise number of abrasions.

Likewise, the trial court's findings did not deny defendant his right to confrontation. A defendant is denied his right to confrontation when evidence that has not been admitted at trial is presented to or considered by the trier of fact. See *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991). Here, the trial judge merely inferred from the medical records that the complainant had suffered

abrasions consistent with an assault and consistent with her testimony. Because there was no indication that the court relied on any extraneous evidence in doing so, we hold that defendant was not denied his right to confrontation.

II

Defendant also contends that he was denied effective assistance of counsel when his counsel stipulated to the admission of the complainant's medical records and then made them a cornerstone of his closing argument. We disagree. While trial counsel's tactical decision to let in the medical records to show that the abrasions were minor and therefore not supportive of the complainant's version of the facts may have backfired, the decision was a judgment call which we will not second-guess. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

III

Defendant further argues that the trial court rendered a verdict inconsistent with its findings of fact. We disagree. Here, defendant's acquittal of felonious assault, MCL 750.82; MSA 28.277, indicates that the trial court did not find beyond a reasonable doubt that defendant assaulted the complainant with a knife. However, unlike *People v Fairbanks*, 165 Mich App 551; 419 NW2d 13 (1987), on which defendant relies, here, defendant's remaining convictions did not depend on the existence of a weapon. The aggravating circumstance applicable to both first-degree criminal sexual conduct convictions was the commission of another felony (the first-degree home invasion). The record also indicates that defendant used physical force rather than the alleged knife to accomplish the two acts of sexual penetration. Thus, because the knife was not essential to defendant's convictions, the trial court's verdicts were not inconsistent with her findings of fact.

IV

Defendant contends that the trial court should not have admitted, as an excited utterance, the complainant's statement to her mother that she had just been raped by defendant. We disagree. To qualify as an excited utterance exception to the hearsay rule, a statement must: (1) arise out of a startling event or condition; (2) be made before there has been time to contrive and misrepresent, and (3) relate to the circumstances of the startling event or condition. *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). Independent evidence, apart from the hearsay statement itself, must establish the occurrence of the startling event or condition. See *People v Burton*, 433 Mich 268, 294-295; 445 NW2d 133 (1989). A sexual assault qualifies as a startling event, see, e.g., *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988), and here, the occurrence of the sexual assault was independently established by the complainant's testimony. Therefore, her statement to her mother qualifies as a statement relating to the startling event or condition.

Defendant's argument that the complainant had time to contrive or misrepresent is not persuasive. Here, the complainant was crying and appeared to be scared and upset as she left her house (in December) before thinking to put on shoes. We conclude that the statement was made while

the complainant was still under the stress caused by the sexual assault. Therefore, the trial court did not abuse its discretion when it admitted her statement.

V

Defendant's final argument, which we reject, is that his waiver of a jury trial was invalid. Defendant's constitutional right to trial by jury may be waived. *People v Delahanty*, 173 Mich App 487; 434 NW2d 431 (1988). To constitute a valid waiver, a defendant must first be offered an opportunity to consult with a lawyer. MCR 6.402(A). Here, defendant met with counsel prior to waiving his right to a jury trial. Defendant's suggestion that this consultation was not "meaningful" because defense counsel had not yet seen discovery is unconvincing.[1] Finally, we disagree with defendant's argument that because the trial court did not inform him that a jury verdict must be unanimous, his waiver was not voluntary. This Court has specifically held that this omission does not render a waiver invalid. *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992).

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Our review of the record of defendant's waiver hearing reveals nothing to suggest that the trial court erred when it concluded that defendant waived his right to a jury trial voluntarily.